Filed 5/12/15 Burrell v. Bank of America CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

FRANK L. BURRELL III, as Trustee, etc., Plaintiff and Appellant, v. BANK OF AMERICA, N.A., Defendant and Respondent.	H038691 (Santa Clara County Super. Ct. No. 1-04-CV-020433)
SANG BAE LEE, Cross-complainant and Appellant, v. BANK OF AMERICA NT & SA, Cross-defendant and Respondent.	H038853 (Santa Clara County Super. Ct. No. 1-04-CV-020433)

The case underlying these two appeals involves soil and groundwater contamination caused by perchloroethylene (PCE) allegedly released from Hillview Cleaners, which has operated at the Saratoga Village Shopping Center since 1955. The shopping center is owned by the Frank L. Burrell 1937 Trust (the 1937 Trust). Plaintiff Frank L. Burrell III is the trustee of the 1937 Trust. In 2004, Burrell sued the current

owner/operator of Hillview Cleaners (defendant and cross-complainant Sang Bae Lee), the former owner/operators (defendants Eugene and Julia Zambetti), and defendant Wells Fargo Bank. Burrell sued Wells Fargo as trustee of the trust that formerly owned the shopping center and as successor to a prior trustee, Bank of America (BofA). The gravamen of Burrell's complaint was that the Zambettis and Lee caused or permitted releases of PCE and that BofA and Wells Fargo breached their duties as trustees "by failing to properly administer and supervise the activities of [the Zambettis and Lee] with respect to the storage, usage, disposal, and release of contaminants." The complaint sought damages, declaratory relief, and equitable indemnity.

Lee cross-complained against Burrell, the Zambettis, Wells Fargo, and Does 1 through 100 for contribution or indemnity under California's Hazardous Substance Account Act (Health & Saf. Code § 25300 et seq. (HSAA)), for injunctive relief under the Resource Conservation and Recovery Act (42 U.S.C. § 6901 et seq. (RCRA)), and for nuisance, trespass, waste, equitable contribution and indemnity, and declaratory relief. He later amended the cross-complaint to add claims for response costs and contribution under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601 et seq. (CERCLA)). In 2011, Lee substituted BofA for Doe cross-defendant Number Two. He served BofA with the summons and cross-complaint in October 2011.

In 2012, the trial court granted summary judgment for Wells Fargo on Burrell's complaint and for BofA on Lee's cross-complaint. The court entered judgments of dismissal from which Burrell and Lee separately appeal.[1]

Burrell contends that the trial court erred in granting summary judgment because (1) Wells Fargo failed to meet its initial burden of showing that one or more elements of

[1] This court denied Burrell's motion to consolidate the two appeals and on its own motion ordered them considered together for purposes of oral argument and disposition.

his claims could not be established; (2) even if Wells Fargo met its initial burden, his evidence in opposition to the motion "clearly" created triable issues of material fact; and (3) the trial court failed to comply with Code of Civil Procedure section 437c, subdivision (g).[2]

Lee contends that the trial court erred in granting summary judgment for BofA and dismissing his cross-complaint against BofA with prejudice because (1) an exception to section 583.210 applied; (2) BofA did not meet its initial burden of producing "affirmative evidence to negate its strict liability as a 'responsible party' under the [HSAA]"; (3) even if BofA met its initial burden, Lee's evidence in opposition created triable issues of fact; and (4) the trial court failed to comply with section 437c, subdivision (g).

We affirm the judgment in favor of Wells Fargo and modify and affirm the judgment in favor of BofA.

I. Background

The F.L. Burrell Testamentary Trust No. 2 (Trust No. 2) owned the shopping center from 1955 to 1987. A.S. Dempsey was the original trustee of Trust No. 2. BofA became a co-trustee in 1970. BofA became the sole trustee of Trust No. 2 in 1974.

Trust No. 2 sold the shopping center to the 1937 Trust in 1987. N.D. Matheny was the trustee of the 1937 Trust at the time. Burrell succeeded him in 2001.

BofA sold most of its trust business (including Trust No. 2) to Wells Fargo in April 1987.[3] Wells Fargo was the trustee of Trust No. 2 from April through September

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[2] Further statutory references are to the Code of Civil Procedure unless otherwise noted.

[3] BofA agreed to indemnify Wells Fargo against claims arising out of BofA's conduct of the trust business. Wells Fargo transferred its interest in the action to BofA after Burrell noticed his appeal. On October 19, 2012, this court granted BofA's

1987. Trust No. 2 was terminated after it sold the shopping center, and the trust's assets were distributed to its beneficiaries.

Hillview Cleaners has been a tenant at the shopping center since 1955. The Zambettis owned and operated the business from 1955 to 1983. Lee purchased the business from the Zambettis in 1983 and has operated it since then.

In 1991, a site investigation at a gas station near the shopping center detected PCE in a temporary monitoring well. In September 1996, the California Regional Water Quality Control Board (RWQCB) informed Matheny that it suspected Hillview Cleaners was the source of the contamination. The RWQCB requested site-history information from Matheny. The information was provided, and the RWQCB took no further action.

Burrell refinanced the shopping center in 2002. An environmental site assessment performed in connection with the refinancing found elevated levels of PCE in soil and groundwater.

Burrell filed suit in 2004. As relevant here, his complaint asserted claims for negligence and declaratory and equitable relief against Wells Fargo. Burrell amended his complaint in 2010, and Wells Fargo demurred. The trial court sustained the demurrer to Burrell's negligence cause of action, which alleged that BofA and Wells Fargo owed the 1937 Trust a myriad of duties, including to "inspect, administer and supervise the activities of [the Zambettis and Lee]." The court ruled that "[t]he only alleged duty that is relevant to [Burrell's] attempt to hold Wells Fargo liable for damage caused by the release of PCE is the alleged duty to prevent unlawful discharges of toxic chemicals." The court explained that *Resolution Trust Corp. v. Rossmoor Corp.* (1995) 34 Cal.App.4th 93 (*Resolution Trust*) "[a]t best . . . establishes that a landlord has a duty, upon execution of a lease, to inspect the premises to make the premises reasonably safe

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application to substitute in place of respondent Wells Fargo. To avoid confusing the two banks, we will continue to refer to the respondent on Burrell's appeal as Wells Fargo.

from dangerous conditions." The court granted Burrell leave to amend because it was "reasonably possible" that Burrell could allege "an actual legal duty imposed on a landlord or trustee of commercial property." Burrell filed a second amended complaint that included allegations that BofA and Wells Fargo knew about releases of PCE from Hillview Cleaners and negligently failed to act on that knowledge.

In 2011, Lee substituted BofA for Doe cross-defendant No. Two. He served BofA with the summons and cross-complaint in October 2011.

1. Wells Fargo's Motion for Summary Judgment

In 2012, Wells Fargo moved for summary judgment on Burrell's complaint. Wells Fargo contended (1) that Burrell lacked standing to sue Wells Fargo on behalf of the beneficiaries of the terminated Trust No. 2 because he was not their successor-in-interest, (2) that even if he was their successor-in-interest, his claims would be barred by res judicata because the accounts of Trust No. 2 were long ago settled and approved by the court, (3) that even if Burrell's claims were not barred by res judicata, Wells Fargo had no liability to Burrell because neither it nor BofA owed any duty to the 1937 Trust or its beneficiaries, and (4) that even if Wells Fargo and/or BofA owed some duty to the 1937 Trust or to its beneficiaries, there was no evidence that contaminants were released during either bank's tenure as trustee or that either BofA or Wells Fargo knew or had reason to know about the alleged releases. Wells Fargo submitted declarations, deposition testimony, and documentary evidence to support its contentions.

Burrell argued in opposition (1) that he had standing because Wells Fargo assumed BofA's liabilities "for its tenure as trustee of the various Trusts conveyed," (2) that res judicata was "inapplicable," and (3) that material issues of disputed fact on the issue of duty and about when BofA or Wells Fargo could or should have discovered the contamination in the exercise of reasonable diligence precluded summary judgment.

Burrell asserted that Wells Fargo had a duty as landlord of the shopping center to conduct " 'frequent inspections,' " to repair and maintain the property, and to perform a

"myriad of other duties." He argued that the bank was "personally negligent" for failing to perform these alleged duties. Burrell cited "historic newspaper documents indicating discharges from the cleaners in the 60s and 70s" to support his contention that Wells Fargo was advised by the City of Saratoga or by Lee that spills or discharges of toxic materials occurred during Wells Fargo's tenure as trustee. Burrell also cited the deposition testimony of Eugene Zambetti, the son of the former owner/operators of Hillview Cleaners. Zambetti testified that he was told about two PCE spills that occurred "in the early 1970s." The first incident allegedly occurred when someone attempted to burglarize the premises by stacking barrels that were outside in the back of the dry cleaners. The burglar used the stacked barrels as a climbing aid and overturned a barrel in the process. The second incident occurred in the early 1970's when someone allegedly dislodged a hose delivering PCE to the dry cleaning machine. The nozzle allegedly fell out of the machine and solvent spilled into baskets of clothes.

On May 30, 2012, the trial court granted summary judgment for Wells Fargo. The court ruled with respect to Wells Fargo's motion that Burrell failed to present admissible evidence that any of the contamination occurred during BofA's or Wells Fargo's tenure as trustee of Trust No. 2. The court noted that Burrell had not produced the newspaper accounts on which he relied "despite being requested to do so." It explained that Zambetti's testimony was inadmissible because "Zambetti states that he [did] not witness either of these incidents and is only testifying as to what he was told about these spills." The court added that Zambetti's testimony also "fail[ed] to establish that BofA had any knowledge of these spills. As Plaintiff points out in his declaration, studies conducted in 1996 and 1998 indicated that there was no reportable contamination anywhere on the site. . . . It was not until 2002, 15 years after Wells Fargo ceased being Trustee, that unlawful levels of contamination were found. . . . Plaintiff simply produces no evidence linking the contamination found in 2002 to conduct by BofA and/or Wells Fargo during their respective tenures as Trustee between 1970 and 1987." The court additionally ruled

that Burrell failed to establish the existence of a duty owed by Wells Fargo "as there is no evidence that BofA and/or Wells Fargo had knowledge or notice of any spills or contamination by [the dry cleaners]."

On July 3, 2012, the trial court entered judgment for Wells Fargo. Burrell filed a timely notice of appeal.

2. BofA's Motion for Summary Judgment

BofA moved for "summary judgment" on Lee's cross-complaint in 2012.[4] The motion asserted two grounds: (1) that sections 583.210 and 583.250 mandated dismissal of Lee's cross-complaint for failure to serve BofA within three years and (2) that Lee could not establish a necessary element of his HSAA cause of action, specifically, that BofA fit the statutory definition of a potentially responsible party.

Lee argued in opposition (1) that BofA waived its right to seek dismissal for untimely service by making a general appearance and participating in the litigation and (2) that BofA was a potentially responsible party under the HSAA because there was evidence that a spill or release of hazardous substances occurred during its tenure as trustee of Trust No. 2. Lee cited Zambetti's deposition testimony as evidence that two PCE spills occurred during BofA's tenure as trustee of Trust No. 2. Lee also submitted the declaration of his expert Timothy Becker, who opined based largely on Zambetti's description of the alleged spills that "there likely was a 'release' of PCE . . . between 1970 and March of 1983."

Both motions were argued on the same day. On May 30, 2012, the court issued a single order granting both motions. The court ruled with respect to BofA's motion that dismissal was warranted because Lee did not timely serve B of A with the summons and

[4] As we explain in greater detail *post*, BofA's "motion for summary judgment" would more properly have been styled as a combined motion for summary judgment and motion for mandatory dismissal for failure to comply with section 583.210. We will treat it as such. (See *Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 947, fn. 4, 949, fn. 6 (*Cahill*); Civ. Code, § 3528.)

cross-complaint. The court additionally found that "there is no evidence that BofA is liable for the alleged contamination at issue." The court explained that "[i]n opposition, Lee argues that pursuant to the [HSAA], BofA is strictly liable for any contamination that occurred while BofA was Trustee. However, Lee is unable to produce admissible evidence sufficient to establish that any contamination occurred while BofA was Trustee." On July 25, 2012, the court dismissed Lee's cross-complaint against BofA with prejudice. Lee filed a timely notice of appeal.

II. Discussion

A. Burrell's Appeal

1. Standard of Review

"'"Appellate review of a ruling on a summary judgment or summary adjudication motion is de novo."'" (*Food Pro Internat., Inc. v. Farmers Ins. Exchange* (2008) 169 Cal.App.4th 976, 993 (*Food Pro*).) "[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issues of material fact and that [the moving party] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) The moving party "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid.*) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.)

"[A] 'defendant . . . has met' his 'burden of showing that a cause of action has no merit if' he 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a

triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' [Citation.]" (*Aguilar, supra,* 25 Cal.4th at p. 849.)

2. Wells Fargo's Initial Burden

Burrell contends that the burden of raising a triable issue of material fact never shifted to him because Wells Fargo failed to meet its initial burden of showing that one or more elements of Burrell's claims could not be established. He asserts that "[o]n the negligence claim, for instance, Wells Fargo failed to set out its and BofA's duties as trustees, landlords, and property managers, and to demonstrate that they carried out those duties." He complains that Wells Fargo had "complex and varied fiduciary and statutory duties" that it "failed even to acknowledge, let alone set out, as was its burden to do on its summary judgment motion." The contention lacks merit.

"The pleadings define the issues to which a summary judgment motion must be directed." (*Addy v. Bliss & Glennon* (1996) 44 Cal.App.4th 205, 215.) Burrell's second amended complaint alleged that "[f]rom September 1986 to approximately September of 1987 Defendant Wells Fargo acted as Trustee of Plaintiff 1937 Trust." The complaint further alleged that Wells Fargo "was in sole and plenary control of the Shopping center as trustee of the 1937 Trust" during that time. The inferential allegation is that Wells Fargo owed fiduciary duties to the 1937 Trust beneficiaries. (See Rest.2d Trusts, §§ 2, p. 6 ["A trust . . . is a fiduciary relationship with respect to property . . . ."], 170, com. a, p. 364 ["A trustee is in a fiduciary relation to the beneficiary . . . ."].)

Wells Fargo's motion acknowledged and addressed this issue. Wells Fargo submitted evidence (including Burrell's deposition testimony) that neither BofA nor Wells Fargo was a trustee of the 1937 Trust during any relevant time period. The evidence showed that Matheny (not BofA and not Wells Fargo) was the trustee when the

1937 Trust purchased the shopping center in 1987. Matheny continued as trustee until Burrell succeeded him in 2001. Burrell was the current trustee. None of this evidence was disputed. The conclusion follows that as strangers to the 1937 Trust, BofA and Wells Fargo did not owe fiduciary duties to the beneficiaries of that trust. Wells Fargo's initial showing was sufficient to shift the burden to Burrell to produce admissible evidence raising a triable issue concerning BofA's and Wells Fargo's alleged fiduciary duties to the beneficiaries of the 1937 Trust.

Burrell's second amended complaint also alleged that BofA and Wells Fargo had "contractual and common law" duties to administer and supervise operations at the shopping center. The duties that a trustee owes to third parties such as the beneficiaries of the 1937 Trust are limited. "Traditionally, a lessor owed no duty to third parties concerning dangerous conditions on the premises which came into existence after the tenant took possession. [Citation.] But the law has evolved so ' . . . a commercial landowner cannot totally abrogate its landowner responsibilities merely by signing a lease.' [Citations.]" (*Resolution Trust, supra*, 34 Cal.App.4th at p. 101.) "[M]odern cases on landlord liability . . . have turned on negligence based on knowledge, or at least a reason to know, of the hazard. (*Id.* at p. 100, fn. 6.) However, "'[a] landlord cannot be held to be responsible for all dangers inherent [even] in a dangerous business.' [Citation.] The defendant must be aware of the specific dangerous condition and be able to do something about it before liability will attach. [Citations.]" (*Resolution Trust*, at p. 102; *Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1132 [landlord renewing lease has duty to exercise reasonable care in the inspection of his commercial property and to remove a dangerous condition if he knows or in the exercise or reasonable care would have known it existed].) These rules apply to property managers as well as landlords. (See *Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1378-1379.)

Wells Fargo's motion addressed the issue of its and BofA's alleged contractual and common law duties to the beneficiaries of the 1937 Trust. There could be no duty absent evidence that either bank knew or in the exercise of reasonable diligence would have known about the alleged releases. (*Resolution Trust*, *supra*, 34 Cal.App.4th at p. 102.) Accordingly, Wells Fargo submitted evidence that supported an inference that neither it nor BofA were or could have been aware of the alleged releases of PCE from Hillview Cleaners during their respective tenures as trustee of the terminated Trust No. 2. The evidence showed that the first environmental testing at the shopping center was in 1996 after Matheny learned that PCE had been detected in a gas station monitoring well. Wells Fargo also submitted Lee's response to a request for admissions stating that he first became aware of potential contamination on approximately September 10, 1996, when he received a copy of the RWQCB's letter to Matheny. Wells Fargo also submitted the declaration of Kara Arguello, one of counsel for Wells Fargo. She declared that in response to Burrell's assertion that there were "historic newspaper documents indicating discharges from the cleaners in the 60s and 70s," she performed a Westlaw search for pre-1988 articles containing the words "PCE," "contamination," and "Saratoga." Her search returned two articles, neither of which mentioned the shopping center. Wells Fargo also submitted Burrell's discovery responses, which highlighted the complete absence of evidence that anyone was aware of any contamination at or near the shopping center before Wells Fargo's trusteeship terminated in 1987.

Burrell challenges Wells Fargo's reliance on his own lack of evidence. He asserts that Wells Fargo was "required to present *evidence*, and not simply assert that Burrell does not possess, and cannot obtain, needed evidence." He argues that Wells Fargo "could have met *its* burden to show that Burrell cannot establish one or more elements of each of his claims . . . by conclusively establishing that the contamination at issue did *not* originate during that time period, *i.e.*, when Wells Fargo and BofA were trustees." He contends that the burden never shifted to him because Wells Fargo "failed to present *any*

evidence of any spills or releases at or in the vicinity of the [dry cleaner] site *after* September 25, 1997" or "*any* evidence . . . to show that it and BofA met their duties as trustees, property managers, and landlords . . . ." The contention lacks merit.

Burrell misperceives the moving party's initial burden on summary judgment. California law no longer requires a defendant moving for summary judgment to conclusively negate an element of the plaintiff's cause of action. (*Aguilar, supra,* 25 Cal.4th at p. 853.) "[A]ll that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action." (*Ibid.*) "The defendant has shown that the plaintiff cannot establish at least one element of the cause of action by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar,* at p. 854.) A defendant may rely on the plaintiff's "factually devoid discovery responses" to make this showing. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590 (*Union Bank*).) However, the defendant must do more than "simply point out" through argument that the plaintiff does not possess and cannot reasonably obtain needed evidence. (*Aguilar*, at p. 854.) "[T]he defendant *must* 'support[]' the 'motion' with evidence including 'affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice' must or may 'be taken.'" (*Aguilar*, at p. 855, citing § 437c, subd. (b).)

Wells Fargo more than met this standard. "To recover on a negligence theory, a plaintiff must prove duty, breach, causation and damages." (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 480.) At issue here is the element of duty. Wells Fargo submitted abundant evidence that Burrell could not establish this necessary element because he had no evidence that either bank knew or in the exercise of reasonable diligence could have known about the alleged releases of PCE during its tenure as a trustee. Wells Fargo's evidence included Burrell's deposition testimony and his responses to document requests and interrogatories.

Burrell was asked to produce all documents relating to any environmental tests, investigations or studies at the shopping center from 1955 to the present or "at any time." He responded that he would do so "[t]o the extent such documents exist." It was undisputed that he produced no documents relating to tests, investigations or studies conducted during either bank's tenure as trustee of Trust No. 2. It was undisputed that there was no environmental testing at the shopping center before September 4, 1996.

An interrogatory asked Burrell to identify all witnesses with knowledge of facts supporting his contention that the City of Saratoga and/or Lee advised BofA and/or Wells Fargo during their respective tenures as trustee of Trust No. 2 that spills or discharges of toxic materials from the dry cleaners were known or suspected. Burrell's response identified only himself. Wells Fargo submitted Burrell's deposition testimony, which established that he had no personal knowledge of any contamination before 2002. Burrell stated that he could not recall if his father or Matheny told him about the contamination "in the late '90s or not." Wells Fargo's trusteeship ended well before "the late '90s."

Other interrogatories asked Burrell to state all facts and to identify all documents supporting his contention about reports from the City of Saratoga and/or Lee about spills or discharges. Burrell's response stated no facts. Instead, it reiterated his *contention* that Wells Fargo "failed and refused to investigate the operations of the [dry cleaners]" and his further contention "on information and belief" that Wells Fargo "did no inspections of the premises for spills."

Burrell's interrogatory responses asserted that "[t]here are historic newspaper documents indicating discharges from the cleaners in the 60s and 70s." Wells Fargo propounded requests for documents supporting these assertions. Burrell responded that "[t]o the extent such documents exist, they have been produced." It was undisputed that Burrell produced no newspaper accounts of discharges from the premises. Further, Arguello's declaration described her independent and fruitless Westlaw search for any such accounts.

Burrell's discovery responses demonstrated that he had no evidence of discharges from the premises and no evidence of contamination during BofA's or Wells Fargo's respective tenures as trustee of Trust No. 2. Those responses demonstrated (and Arguello's declaration underscored) that Burrell had no evidence that either bank (or indeed anyone) knew or in the exercise of reasonable diligence would have known about the releases that Burrell alleges occurred during their respective trusteeships. We conclude that the evidence that Wells Fargo submitted with its motion was more than sufficient to satisfy its initial burden to show an absence of a duty owed by BofA or Wells Fargo to the beneficiaries of either trust. (*Union Bank*, *supra*, 31 Cal.App.4th at pp. 581, 592-593.) The burden shifted to Burrell to produce admissible evidence showing the existence of a genuine issue of material fact. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.)

3. Burrell's Burden

Burrell contends that even if Wells Fargo satisfied its initial burden, his evidence in opposition to summary judgment "clearly" created a triable issue of material fact "as to whether Wells Fargo and BofA breached their fiduciary duties as trustees, landlords, and property managers for the shopping center and its beneficiaries" by failing to discover releases of PCE. He asserts that he presented "strong evidence . . . that much of the contamination at and emanating from the [dry cleaner] site originated *during* BofA's and Wells Fargo's tenure as trustees from 1970 until September 25, 1987." We disagree.

"[I]t is axiomatic that the party opposing summary judgment '"must produce admissible evidence raising a triable issue of fact. [Citation.]" [Citation.]' [Citation.] This requirement is black letter law . . . ." (*All Towing Services LLC v. City of Orange* (2013) 220 Cal.App.4th 946, 960; § 437c, subd. (p)(2).) "A party may not avoid summary judgment based on mere speculation and conjecture . . . ." (*Compton v. City of Santee* (1993) 12 Cal.App.4th 591, 595-596.) Declarations and deposition testimony must be based on personal knowledge. (§ 437c, subd. (d).) "Evidence containing

hearsay is not admissible evidence and will not raise a triable issue defeating summary judgment." (*Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1026-1027.)

The evidence that Burrell presented consisted of (1) Zambetti's deposition testimony about two alleged spills; (2) a 1998 letter from P&D Environmental Services and a 2003 work plan from Frey Environmental, Inc., both of which reference (but do not attach or quote from) a 1991 site investigation at a nearby gas station; and (3) the declaration of his expert Michael Harrison.

a. Zambetti's Testimony

Burrell relied on Zambetti's testimony about "spills that occurred in the early 1970's," one during a burglary and the other when a hose delivering solvent became dislodged from the machine. Zambetti's statements were inadmissible. He testified that he "believe[d]" there was a spill associated with the burglary, but he "wasn't there at the scene." He "was not the discovery person of the burglary or of the container that was on the walkway in the back." He "was told" there was a spill. He had "no idea what was in the smaller barrel" that was allegedly kicked over. Nor did he know what was done to clean up any alleged spill because he "wasn't there to clean it up."

Zambetti "was not present at the time" of the second alleged spill either. He "was told that someone had hit the hose and also that the on and off switch of the nozzle didn't turn off and solvent had come out of the tank and got onto the baskets of clothes." By the time Zambetti arrived, "one of the workers was cleaning it up." He testified, "I don't know how much it was."

Wells Fargo served written evidentiary objections to Burrell's evidence, arguing among other things that Zambetti's testimony was based on hearsay and that he lacked personal knowledge of the alleged spills. The trial court did not rule on the objections. Burrell asserts that the trial court was thus "presumed to have overruled the objections and considered the evidence on the merits . . . ." To the extent he claims that this court

must also consider Zambetti's testimony on the merits, we disagree. "[I]f the trial court fails to rule expressly on specific evidentiary objections, it is presumed that the objections have been overruled, the trial court considered the evidence in ruling on the merits of the summary judgment motion, and the objections are preserved on appeal." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.)

Wells Fargo has reasserted its objections to Zambetti's deposition testimony, and we find those objections meritorious. Zambetti's own words established that he lacked personal knowledge of either alleged spill and that his testimony was inadmissible hearsay. He was not present when either incident occurred. Instead, he "was told" about them by a person or persons that he did not identify.

Burrell maintains that Zambetti's testimony was "clearly admissible" under the party admission exception to the hearsay rule. We disagree.

Evidence Code section 1220 provides that "[e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party . . . ." A "'[d]eclarant' is a person who makes a statement.' " (Evid. Code, § 135.) "Ordinarily, the word 'declarant' is used in the Evidence Code to refer to a person who makes a hearsay statement as distinguished from the witness who testifies to the content of the statement." (Cal. Law Revision Com. com., 29B pt.1A West's Ann. Evid. Code (2011 ed.) foll. § 135, p. 26.)

Here, the hearsay declarant was the unidentified person or persons who told Zambetti about the alleged spills. That person or persons must be distinguished from Zambetti, the witness who testified about the content of the hearsay declarant's statement. (See *Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 848-850.) There is no evidence in the record that the unidentified declarant who told Zambetti about the alleged spills was a party to this action. (Evid. Code, § 1220.) Thus, Burrell has not established that the party admission exception to the hearsay rule applies.

Burrell next argues that the trial court erred in disregarding Zambetti's testimony because Zambetti was "certainly competent to testify to . . . what he saw, what he heard, [and] what he has personal knowledge of, including what was spilled, how it was spilled, the aftermath of the spill, etc." Burrell insists that Zambetti "was certainly competent to state his belief that it was PCE, a chemical with a strong smell, that had been spilled." The problem with this argument is that Zambetti did not state his belief that the substance was PCE. He did not identify the substance as PCE. He did not testify that he smelled PCE after either incident. He did not describe any smells at all. He unequivocally testified that he had "no idea" what may or may not have been spilled during the burglary. With respect to the hose incident, he testified that "I was not present at the time -- delivery of chemicals and the delivery to the dry-cleaning machine and putting the material in the dry-cleaning machine, the solvent. I was told . . . ." The record reflects that all Zambetti saw after the hose incident was a worker cleaning up an unknown amount of what someone told him was solvent that had spilled "onto the baskets of clothes" when a hose allegedly dislodged. Nothing in Zambetti's testimony about the hose incident permits an inference that PCE, as opposed to water or detergent or some other substance, was spilled into the baskets of clothes. In sum, Zambetti described nothing that raised a triable issue of material fact about whether PCE releases occurred during BofA's or Wells Fargo's respective tenures as trustee of Trust No. 2 or whether either bank knew or should have known about any such releases.

b. 1991 Sampling Result at Chevron Station

Two documents produced during discovery (a 1998 letter from P&D Environmental Services to the then-mortgagor of the shopping center and a 2003 work plan prepared for Burrell's counsel by Frey Environmental, Inc.) assert that PCE was detected in a sample taken in 1991 from a groundwater monitoring well at a Chevron station near the shopping center. Both documents refer to (but do not attach or quote from) a 1991 report analyzing a sample taken from a groundwater monitoring well at the

gas station. Burrell argues for the first time on appeal that these documents "suggest" that "at least some of the contamination" occurred during BofA's or Wells Fargo's tenure as trustee.

Wells Fargo counters (1) that Burrell forfeited this argument by failing to raise it below, (2) that the statements in the two reports that Burrell relies on are double hearsay to which no exception applies, and (3) that Burrell has provided no scientific basis or expert testimony to support his assertion that the 1991 analytical result "suggests" that contamination existed years before 1991. We agree with all three points, but need reach only the first.

"'Generally, the rules relating to the scope of appellate review apply to appellate review of summary judgments.'" (*Expansion Pointe Properties Limited Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP* (2007) 152 Cal.App.4th 42, 54.) "It is axiomatic that arguments not asserted below are waived and will not be considered for the first time on appeal." (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3 (*Ochoa*).) "In reviewing a grant of summary judgment, '[w]e may consider only those facts which were before the trial court, and disregard any new factual allegations made for the first time on appeal. Thus, unless they were factually presented, fully developed and argued to the trial court, potential theories which could theoretically create "triable issues of material fact" may not be raised or considered on appeal.' [Citations.]" (*Ashdown v. Ameron Internat. Corp.* (2000) 83 Cal.App.4th 868, 874.)

The 1991 report is not included in the record on appeal and nothing in the record suggests it was ever presented to the trial court. The 1998 letter and the 2003 work plan are included in the record on appeal. They were presented below, but not in connection with the argument that Burrell makes here. Burrell produced the 1998 letter in discovery. Wells Fargo cited it to support its argument that Burrell's negligence cause of action was time-barred. Burrell attached the 2003 work plan as an exhibit to his declaration in opposition to summary judgment. He declared that the work plan "was the first time that

I had any reason to believe that there were unlawful levels of contamination present at the premises in reportable amounts or emanating from Hillview Cleaners." Nowhere did Burrell argue that the 1998 letter or the 2003 work plan "suggest[ed] that at least some of the contamination" occurred during BofA's or Wells Fargo's tenure as trustee. Consequently, Wells Fargo had no opportunity to address the argument. The trial court had no opportunity to consider it. "'Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider.'" (*Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591.) We deem the argument forfeited. (*Ochoa*, *supra*, 61 Cal.App.4th at p. 1488, fn. 3.)

c. Harrison's Declaration

Burell also relied on a declaration from his expert Michael Harrison. Harrison declared that he was an environmental engineer and that he had been working in conjunction with the environmental consulting firm retained by the Zambettis. Harrison "estimate[d]" based on the concentrations of PCE in the groundwater at the site "that the release must have involved not less than 27 gallons." Harrison also opined "[b]ased on [Zambetti's] deposition testimony and patterns of releases identified at historical dry cleaning operations for similar dry cleaning facilities" that it was "apparent there were more than one spills [*sic*] over time at the site."

Burrell argues that "[i]t can be inferred from Mr. Harrison's uncontradicted declaration that PCE spills occurred at Hillview Cleaners *during* BofA's tenure as trustee consistent with Mr. Zambetti's uncontradicted deposition testimony." We disagree. Harrison's two-page declaration neither says nor implies anything about when any releases of PCE may have occurred. In sum, Burrell failed to present evidence sufficient to raise a triable issue of fact precluding summary judgment.

4. Section 437c, subdivision (g)

Burrell contends that the trial court's order does not provide a sufficient statement of reasons or sufficiently address his opposing evidence. He maintains that "that failure alone provides an independent basis for reversing the judgment." We disagree.

Section 437c requires a trial court granting a motion for summary judgment to "specify the reasons for its determination" by written or oral order with specific reference "to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists." (§437c, subd. (g).) "A statement of reasons is sufficient if it allows for meaningful appellate review." (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 448 (*Pistachio Ranch*).)

The reasons the trial court provided here satisfy the "meaningful appellate review" standard. (*Pistachio Ranch, supra,* 88 Cal.App.4th at p. 448.) With respect to Burrell's negligence cause of action, the order explained that "Plaintiff is unable to establish the existence of a duty owed by Wells Fargo as there is no evidence that BofA and/or Wells Fargo had knowledge or notice of any spills or contamination by [the dry cleaners]." As the order pointed out, Burrell was unable to present any evidence that any of the alleged contamination occurred during either bank's tenure as trustee. He was similarly "unable to produce any documents relating to or evidencing any environmental tests, investigations, inspections or studies conducted at the Shopping Center between 1955 and 1987." He also "failed to produce [the] newspaper accounts" that he claimed supported his allegation that BofA and Wells Fargo were advised by the City of Saratoga and by Lee that spills of toxic materials from the dry cleaners were known or suspected. This was "despite [his] being requested to do so."

The trial court's order also explained why Zambetti's deposition testimony was insufficient to raise a triable issue of fact. "Mr. Zambetti states that he [did] not witness either [of the two incidents he referred to] and [was] only testifying as to what he was told about these spills. Moreover, Mr. Zambetti's testimony is insufficient to establish

that these spills were 'significant' and/or had any relationship or connection to the contamination at issue. Mr. Zambetti's testimony also fails to establish that BofA had any knowledge of these spills. As Plaintiff points out in his declaration, studies conducted in 1996 and 1998 indicated that there was no reportable contamination anywhere on the site. . . . It was not until 2002, 15 years after Wells Fargo ceased being Trustee, that unlawful levels of contamination were found. . . . Plaintiff simply produces no evidence linking the contamination found in 2002 to conduct by BofA and/or Wells Fargo during their respective tenures as Trustee between 1970 and 1987." We conclude that the order satisfied the requirements of section 437c, subdivision (g).

Burrell complains that the trial court's order "failed even to mention" his fifth cause of action for declaratory relief and equitable indemnity. That does not warrant reversal of the judgment.

"[T]he court's failure to perform its statutory duty does not automatically result in reversal." (*Ruoff v. Harbor Creek Community Assn.* (1992) 10 Cal.App.4th 1624, 1627.) "'We are not confined, in considering the granting of the summary judgment, to the sufficiency of the stated reasons. It is the validity of the ruling which is reviewable and not the reasons therefor. [Citation.]'" (*Id.* at pp. 1627-1628.) "The lack of a statement of reasons presents no harm where . . . our independent review establishes the validity of the judgment." (*Soto v. State of California* (1997) 56 Cal.App.4th 196, 199.)

Our review is not hampered by the trial court's failure to explain its ruling on Burrell's fifth cause of action against Wells Fargo. That cause of action was plainly premised on a finding that Wells Fargo was liable to Burrell. Here, the trial court found no triable issues of material fact and no liability. Thus, it did not need to explain its ruling on Burrell's fifth cause of action.

Burrell's reliance on *Pistachio Ranch* is misplaced. The record before the appellate court in that case included no oral or written statement of reasons at all. (*Pistachio Ranch*, *supra*, 88 Cal.App.4th at p. 449.) The error was not harmless because

the issues were complex, there were "contradictions in declarations prepared for the motion as compared to testimony given in deposition" and the trial court "clearly decided credibility issues." (*Ibid*.) On the particular record before it and without a sufficient statement of reasons from the trial court, the *Pistachio Ranch* court was precluded from undertaking a meaningful review of the issues. (*Ibid*.)

No such problems are presented here. We reject Burrell's contention that the trial court failed to comply with section 437c, subdivision (g). We conclude that the trial court did not err in granting summary judgment in favor of Wells Fargo.

B. Lee's Appeal

1. Dismissal for Untimely Service of Summons and Cross-Complaint

Lee contends that the trial court erred in dismissing his cross-complaint against BofA for untimely service. We disagree.

Preliminarily, we address a procedural issue with BofA's styling of its motion as one "for summary judgment" based in part on Lee's failure to effectuate service of the cross-complaint within three years. The statutory schemes for dismissal for untimely service (§§ 583.210, 583.250) and for summary judgment (§ 437c) differ in a number of respects. The burdens of proof are different. The issue on a motion for mandatory dismissal is not whether a triable fact question exists but whether the party opposing dismissal can defeat the moving party's showing of untimely service by establishing a statutory excuse or exception. (*Perez v. Smith* (1993) 19 Cal.App.4th 1595, 1599.)

The dispositions that result are also different. When a party obtains summary judgment, the action is dismissed with prejudice. (See § 437c, subd. (c); see *City of Oakland v. Oakland Raiders* (1982) 32 Cal.3d 60, 63.) When a party prevails on a motion to dismiss, the pleading against that party is dismissed without prejudice. (§ 581, subds. (b)(4), (g).)

The standards of appellate review are also different. We review a grant of summary judgment de novo. (*Food Pro, supra*, 169 Cal.App.4th at p. 993.) We review a section 583.250 dismissal for substantial evidence supporting the trial court's determination. (*Graf v. Gaslight* (1990) 225 Cal.App.3d 291, 295, disapproved on another ground in *Watts v. Crawford* (1995) 10 Cal.4th 743, 758, fn. 13.) For all of these reasons, dismissal for failure to timely effect service is more properly sought by a motion to dismiss pursuant to section 583.250.

Here, BofA's motion "for summary judgment" was in substance if not in form a combined motion for summary judgment and for dismissal pursuant to section 583.250. We will treat it as such. (See *Cahill, supra*, 194 Cal.App.4th at pp. 947, fn. 4, 949, fn. 6; Civ. Code, § 3528.)

We reject Lee's argument that dismissal was not warranted. "The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant." (§ 583.210, subd. (a).) "[A]n action is commenced at the time the complaint is filed." (*Ibid*.) "'Complaint' includes a cross-complaint . . . ." (§ 583.110, subd. (b).) "[O]nce *one* defendant is sued, *all* fictitiously named defendants must be brought in within a maximum period of three years . . . ." (*General Motors Corp. v. Superior Court* (1996) 48 Cal.App.4th 580, 589, fn. 10 (*General Motors*).) If service is not made within three years, "[t]he action shall be dismissed . . . ." (§ 583.250, subd. (a).) "The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute." (§ 583.250, subd. (b).)

Lee filed his cross-complaint on August 3, 2004. He did not serve BofA with the summons until October 2011. Lee concedes this point. Thus, dismissal was mandated unless a statutory exception applied. (§ 583.250, subd. (b).)

Lee does not contend that the three-year period was extended pursuant to section 583.230. Nor does he claim that it was tolled pursuant to section 583.240. He relies

instead on section 583.220, which provides in pertinent part that "[t]he time within which service must be made . . . does not apply if the defendant enters into a stipulation in writing or does another act that constitutes a general appearance in the action." (§ 583.220.) Lee asserts that BofA waived its opportunity to rely on untimely service by filing an answer to Lee's cross-complaint on November 23, 2011, and then participating in the litigation before seeking dismissal on February 22, 2012. The argument lacks merit.

It has long been the rule that "[t]o prevent dismissal, any claimed general appearance must have occurred within the mandatory three-year period. An appearance made thereafter does not deprive a defendant of his right to dismissal." (*Brookview Condominium Owners' Assn. v. Heltzer Enterprises-Brookview* (1990) 218 Cal.App.3d 502, 509 (*Brookview*), citing *Busching* v. *Superior Court of Ventura County* (1974) 12 Cal.3d 44, 52-53 [decided under predecessor statute]; see also *Grant v. McArthur* (1902) 137 Cal.270, 271-272 ["There is in the bill of exceptions a stipulation that appellant might have a certain time to answer or demur; but if this could be considered as an 'appearance' . . . , it was of the date of January 15, 1900, and therefore not 'within said three years.'"].)

Here, the three-year period began to run when Lee filed his original cross-complaint in 2004. (*General Motors, supra,* 48 Cal.App.4th at p. 589, fn. 10.) BofA answered the cross-complaint on November 23, 2011. This was more than seven years after Lee filed his cross-complaint and long after the three-year period specified in section 583.210 expired. Accordingly, neither BofA's general appearance in November 2011 nor its subsequent participation in the litigation constituted a waiver of its right to seek dismissal for untimely service. (*Brookview*, *supra*, 218 Cal.App.3d at p. 509.)

Lee does not contend that BofA made a general appearance at any time *before* it answered the cross-complaint. The only evidence he cited to support his waiver argument was the answer that BofA filed on November 23, 2011, a case management

conference statement that it filed on January 23, 2012, and the motion for summary judgment that it filed on February 15, 2011. Thus, there was no substantial evidence to support his argument that BofA waived its right to seek dismissal for untimely service. (See *Perez, supra*, 19 Cal.App.4th at pp. 1599-1600.) The trial court did not err in dismissing Lee's cross-complaint. (*Perez*, at p. 1600.)

For the first time on appeal, Lee argues that the 1993 and 2002 amendments to section 418.10 "make it clear that making a general appearance prior to bring [*sic*] a motion to dismiss *waives* any objection to the timeliness of service." His failure to raise this argument below has forfeited it on appeal. (*Thompson Pacific Constr., Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 545.)

We are not persuaded by Lee's argument in any event. He contends that the 1993 and 2002 amendments to section 418.10 overruled *Brookview* and its predecessors. We are not convinced that the Legislature sub silentio overruled the decades-long line of cases holding that a general appearance made *after* expiration of the three-year period for service does not waive a defendant's right to seek dismissal for untimely service. The sole case that Lee cites on appeal does not persuade us otherwise. *Roy* v. *Superior Court* (2005) 127 Cal.App.4th 337 (*Roy*) did not involve a motion to dismiss for untimely service of summons. The *Roy* court was not called upon to decide whether a general appearance made years after expiration of the three-year period for service waived the defendants' right to dismissal under section 583.250. "Obviously, cases are not authority for propositions not considered therein." (*Roberts v. City of Palmdale* (*1993*) 5 Cal.4th 363, 372.) "The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court . . . ." (*McGee v. Superior Court* (1985) 176 Cal.App.3d 221, 226.) Limited to its facts, *Roy* stands for the unremarkable proposition that challenges to personal jurisdiction cannot be asserted in an answer but must instead be raised in a motion to quash. (*Roy*, at p. 345.)

Lee contends that if dismissal of his cross-complaint was proper, the dismissal should have been *without* prejudice. BofA concedes the point. We find the concession appropriate. (§ 581, subds. (b)(4), (g) [expressly providing that dismissals "made pursuant to the applicable provisions of Chapter 1.5 (commencing with Section 583.110)" are without prejudice]; *Ashworth v. Memorial Hospital* (1988) 206 Cal.App.3d 1046, 1064 ["[A] section 583 dismissal is not a decision on the merits. Indeed under section 581 it is specifically made a dismissal 'without prejudice.'"].) We will modify the judgment to provide for dismissal *without* prejudice.[5]

2. Insurance Assets

Lee requests that we consider whether "a trust remain[s] viable for the purpose of 'winding up its affairs' where the trust has insurance assets available." More specifically, he asks us to determine whether Trust No. 2 "continues to exist for the purpose of 'winding up its affairs' because it has insurance assets available." He concedes that the trial court never reached these questions but suggests we decide them since they are "likely to arise again on remand."

This court has discretion pursuant to section 43, "if a new trial be granted," to "pass upon and determine all the questions of law involved in the case, presented on such appeal, and necessary to the final determination of the case." (§ 43; *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 66, fn. 9.) We did not order a new trial here. Further, the issue Lee presents is not solely a question "of law." (§ 43.) It would be inappropriate for us to issue an advisory opinion in these circumstances. We decline to do so.

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[5] Our determination that the trial court properly dismissed Lee's cross-complaint for failure to effect timely service on BofA makes it unnecessary for us to reach his additional arguments that BofA did not meet its initial burden on summary judgment, that even if it did, his evidence in opposition created triable issues of fact, and that the trial court failed to comply with section 437c, subdivision (g). We express no opinion on those issues.

III. Disposition

In case No. H038691, the trial court's July 3, 2012 "Judgment of Dismissal as to Wells Fargo Bank, N.A." is affirmed.

In case No. H038853, the trial court's July 25, 2012 "Judgment of Dismissal as to Bank of America, NT&SA" is modified to provide that the dismissal of Lee's cross-complaint for failure to effect timely service is *without* prejudice. As modified, the judgment is affirmed. The parties shall bear their own costs on appeal.

_____
Mihara, J.

WE CONCUR:

_____
Rushing, P. J.

_____
Elia, J.